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No. 95-1478

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF GUN OWNERS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER JAY PRINTZ

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IN THE
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No. 95-1478*

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana, Petitioner

v.

UNITED STATES OF AMERICA

BRIEF OF GUN OWNERS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER JAY PRINTZ

INTEREST OF THE AMICUS CURIAE

Gun Owners Foundation is an Internal Revenue Code Section 501(c)(3) organization incorporated under the laws of the Commonwealth of Virginia. Its purposes are to educate the public about the importance of the Second Amendment to the United States Constitution and to provide legal and other assistance for law-abiding individuals involved in firearms-related cases. GOF's more than 100,000 contributors are, by self-definition, strongly interested in the right to keep and bear arms and in opposing legislation which burdens or impedes that right.

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* Together with the consolidated case of *Sheriff Richard Mack v. United States*, No. 95-1503.

Additionally, the Foundation also strongly supports effective constitutional law enforcement, especially at the State and local levels, and opposes the frequent forays by Congress into essentially local areas -- those reserved to the States and the people by the Ninth and Tenth Amendments to the United States Constitution.

To federalize a crime is frequently to trivialize it. In many congressional attempts to be seen as fighting crime by passing "feel good" legislation, the national legislature forgets that the entire Federal Bureau of Investigation is less than a third the size of the New York City Police Department and that the entire federal judiciary could not fill the muster rolls of the Los Angeles County courts. These congressional digressions not only detract from legitimate federal interests, but affirmatively burden and impede local law enforcement, as in this case.

The not infrequent result is invalid legislation such as that recently condemned in *United States v. Lopez*, 115 S.Ct. 1624, 131 L.Ed.2d (1995).[1]

In this case, where hundreds of thousands of make-work background checks have been imposed on unwilling local draftees, the result is even more pernicious. These background checks had, as of July 1995, produced exactly seven prosecutions[2] -- prosecutions which would have been

1. *Lopez* declared unconstitutional the Gun-Free School Zones Act, 18 U.S.C. § 922(q), as exceeding the Commerce Clause power of the Congress. Although perhaps not determinative of this Court's disposition, it is noteworthy that § 922(q) was duplicative of 43 different State statutes, including that of the State involved there, Texas.

2. Government Accounting Office Report No. GAO/GGD-96-22, *Gun Control: Implementation of the Brady Handgun Violence Prevention Act*, pp. 8, 43 (GAO; Washington, D.C.; Jan. 1996).

possible under existing federal law regardless of the Brady Act.[3] More importantly, the checks have detracted from the official duties and responsibilities (and resources) of local law enforcement -- the real front line of the real war on real crime.

By letter dated July 10, 1996, the Acting Solicitor General of the United States consented to the filing of this brief. By letter dated July 7, 1996, counsel for the petitioner consented to the filing of this brief. By letter dated July 9, 1996, counsel for the petitioner in No. 95-1503 consented to the filing of this brief.

STATEMENT OF THE CASE

The Foundation adopts petitioner's Statement of the Case and incorporates that portion of petitioner's brief herein.

ISSUES PRESENTED

The petitioner in this case has formulated the issue as follows:

> Whether Congress has power under Article I, § 8 of the Constitution, consistent

3. Pre-Brady provisions of the Gun Control Act of 1968, 18 U.S.C. §§ 921-930, require a written denial, subject to penalty for perjury, of all the federal disabilities to purchase of a handgun. A false statement on a BATF Form 4473, "Firearms Transaction Record," is punishable as a felony under either § 922(a)(6) or § 1001 of Title 18, United States Code, just as a Brady Act false statement is. Indeed, one who falsifies a Brady Act form (BATF Form 5300.35, "Statement of Intent to Obtain a Handgun(s)") must also and consistently falsify the Form 4473 if the background check fails to catch his Brady Act false statement. Otherwise, the purchaser is trapped in a dilemma comparable to that posed by 18 U.S.C. § 1623 (inconsistent sworn statements; government not required to show which is false).

with the Tenth Amendment as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command State-created chief law enforcement officers: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning handgun purchasers; and to provide the reasons for adverse determinations, as mandated by the Brady Act, 18 U.S.C. § 922(s)(2), (6)(B) and (C).

Petitioner in the consolidated *Mack* case has formulated the issues presented as follows:

> 1. Whether Congress exceeds its Commerce Clause powers when it orders State officials, themselves neither engaged in nor interfering with interstate commerce, to exercise their police powers with regard to commerce.
>
> 2. Whether a Federal statute requiring State officials to investigate and pass upon the background of each handgun purchaser can be reconciled with the Tenth Amendment as construed in *New York v. United States*, 505 U.S. 144 (1992), on the claimed distinction that it commandeers a State's labor rather than its policymaking.

The *Amicus* is mindful of the stricture of Rule 14.1(a) of the Court that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." If petitioners in these two cases are correct about the Commerce Clause/Tenth Amendment defects in the Brady Act -- and we contend they are -- then additional

evidence of those flaws is to be found in other and corollary conflicts and tensions between the Act and the Constitution. As the Court has stated, "Congress exercises its conferred powers subject to the limitations contained in the Constitution."[4] A necessary corollary to that statement is, if one or more limitations contained in the Constitution are inconsistent with an exercise of purported congressional power, it must be questioned whether Congress has been conferred such a power at all.

Accordingly, and in the spirit of the first sentence of Rule 37(1) of the Court, we respectfully suggest that the following issues are fairly subsumed within the issues as to which certiorari was granted:

> 1. Whether the Brady Act offends the Faithful Execution clause of Article II, § 3 of the Constitution and the Appointments Clause of Article II, § 2 by appointing de facto federal officers who are not commissioned by or answerable to the President and who execute federal law enforcement authority regardless of the powers of the President or his lawful delegates.
>
> 2. Whether the Brady Act impermissibly waives the sovereign immunity of the States to suit by individuals illegally or incorrectly denied purchase of handguns.

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4. *New York v. United States*, 505 U.S. 144, 156 (1992).

3. Whether the Brady Act contravenes the Takings Clause of the Fifth Amendment to the Constitution by impermissibly seizing State and local property without just compensation; and, if not, whether Congress has inadvertently created an enormous (and unfunded) liability for commandeered labor and resources.

SUMMARY OF ARGUMENT

With minor exceptions not relevant to this case, the sole power of appointing lesser officers of the federal government is reserved by the Constitution to the President and his subordinates in the Executive Branch. The President and his subordinates self-evidently have no power or authority over local sheriffs and other State and local law officers. The assignment of federal law enforcement duties to these local officers offends both the Appointments Clause and the Faithful Execution Clause of Article II requiring the President to see that the laws are faithfully executed. This lack of accountability raises numerous subsidiary questions also suggesting that the Act exceeds the Commerce Clause power of Congress.

The Act also purports to create a private cause of action against the States by disappointed applicants, including a provision for the award of attorney fees and costs. This arbitrary attempt to waive the States' sovereign immunity to suit offends the dual sovereignty framework of the Constitution, and raises serious collateral issues with respect to the Eleventh Amendment and this Court's original jurisdiction under Article III.

The practical effect of the Act is an arbitrary taking of State and local resources (private property) without just

compensation and it is therefore violative of the Takings Clause of the Fifth Amendment.

ARGUMENT

The *Amicus* urges reversal of the decisions below based on the Commerce Clause and Tenth Amendment considerations set forth by the petitioners. Given the seemingly extraordinary intrusion of the Brady Act into State and local authority, we believe that additional evidence of the Act's infirmity under the Commerce Clause is to be found in the conflicts and tensions it creates with other provisions of the Constitution, which suggest the following additional grounds compelling reversal:

I. The Brady Act offends the Faithful Execution clause of Article II, § 3 of the Constitution and the Appointments Clause of Article II, § 2 by appointing de facto federal officers who are not commissioned by or answerable to the President and who execute federal law enforcement authority regardless of the powers of the President or his lawful delegates.

In a strange perversion of the doctrine of *posse comitatus*,[5] Congress, by the Brady Act, has rounded up the sheriffs themselves as a posse to pursue fugitive handgun rustlers.

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5. Literally "the power of the county." The historic power of local law officers, probably deriving from the ancient "hue and cry," to enlist the aid of bystander citizens in meeting law enforcement emergencies. See *Livingston v. Dorgenois*, 11 U.S. 577, 579 (1813); *South v. Maryland*, 59 U.S. 396, 402 (1856); *In re Quarles*, 158 U.S. 532, 535 (1895); *United States v. New York Tel. Co.*, 434 U.S. 159, 178 (1977). Some may be tempted to characterize this odd law as being motivated by a congressional desire to be seen as fighting the war on crime while avoiding the pain of actually bearing arms in the conflict.

It is clear that federal authorities can **request** local assistance in executing federal laws.[6] It is equally clear that federal authorities can **accept** assistance from willing local authorities who, under some circumstances, voluntarily enforce federal law.[7] What is not clear -- indeed, what is utterly counterintuitive -- is that the national legislature can **compel** a State or local law officer to execute a national criminal law.[8]

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6. For example, 18 U.S.C. § 331(g) provides that the FBI may request investigative assistance "from any ... local agency...."; and Section 878 of Title 21, U.S.C., authorizes the Attorney General to deputize willing state and local law enforcement officers for drug enforcement duties.

7. *E.g.*, Section 1324(c) of Title 8, U.S.C., authorizes State and local officials to enforce the illegal immigration provisions. See *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983). *Cf. Miller v. United States*, 357 U.S. 301 (1958); *United States v. Di Re*, 332 U.S. 581 (1946). See also 18 U.S.C.§ 3041 authorizing local officials to issue process for arrest. The Fifth Circuit has held that the phrase "some other officer" in Rule 4(d)(1) of the Federal Rules of Criminal Procedure includes State and local officers among those authorized to execute a federal arrest warrant. *United States v. Bowdach*, 561 F.2d 1160 (1977).

8. Nine of the 15 federal judges who have considered the statute do not think it can. *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996) (two cases), aff'g *McGee v. United States*, 863 F.Supp. 321 (S.D. Miss. 1994), and rev'g and rem'g *Koog v. United States*, 852 F.Supp. 1376 (W.D. Tex. 1994), petition for cert. pending; *Frank v. United States*, 860 F.Supp. 1030 (Vt. 1994), aff'd in part and rev'd in part, 78 F.3d 815 (2d Cir. 1996); *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) (two cases), rev'g, aff'g in part, and dism'g in part, *Mack v. United States* 856 F.Supp. 1372 (Ariz. 1994), and aff'g in part, dism'g in part, and rev'g *Printz v. United States*, 854 F.Supp. 1503 (Mont. 1994); *Romero v. United States*, 883 F.Supp. 1076 (W.D. La. 1994).

It is axiomatic that the limited powers and duties of the federal government under our Constitution were carefully and intentionally apportioned by the Founders among the three organs of the national sovereign.[9] Two of the most important powers and duties allocated to the President by the Constitution are the power to appoint and commission lesser officers (Art. II, §§ 2, 3) and the duty -- and authority -- to take care that the laws are faithfully executed (Art. II, § 3).[10]

With the exception of the advice and consent duties of the Senate,[11] the power of the courts to appoint their own officers and employees,[12] and the impeachment duties of the Congress and the Chief Justice,[13] it would appear that the appointment power belongs solely to the Executive Branch. The Court has previously had to curtail an attempt by Congress to poach on that power. *Buckley v. Valeo*, 424 U.S. 1 (1976). In doing so, the Court noted that congressionally-appointed members of the Federal Election Commission were no less "inferior officers" for purposes of the Appointments Clause than were postmasters[14] and

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9. "... the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992).

10. Characterized by this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 577 (1992), as "the Chief Executive's most important constitutional duty."

11. Const., Art. II, § 2.

12. *Ibid.*

13. Const., Art. I, § 3.

14. 424 U.S. at 126, citing *Myers v. United States*, 272 U.S. 52 (1926).

clerks of court.[15] We submit that the federal law enforcement duties imposed by the Brady Act on Chief Law Enforcement Officers[16] (hereafter "CLEOs") is of at least as great a dignity as, and no different in kind from, the essentially ministerial activities of postmasters and clerks of court.

There can be no argument that the Brady Act is other than purely federal legislation enacted by the federal legislature to further perceived federal law enforcement ends. Yet the Act's entire execution is assigned to individuals who are not federal officers, who are not appointed by the President or his subordinates in the Executive Branch, who are accountable to no federal official,[17] and who possess no federal authority other than that purported to be created by the Act.

The President cannot fire or discipline or supervise a sheriff who refuses to perform his Brady Act duties or who performs them badly. The federal Chief Magistrate has no power to supervise or oversee this execution of a purely federal law in any sense. Indeed, his Justice Department subordinates have abandoned even the prospect of negative supervision by repudiating the right to prosecute criminal violations of the Act by CLEOs.[18]

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15. *Ibid.*, citing *Ex parte Hennen*, 13 Peters 230 (1839).

16. Defined by 18 U.S.C. § 922(s)(8) as "the chief of police, the sheriff, or an equivalent officer or the designee of any such officer."

17. Other than in the limited and indirect sense that all civil officers of the States are mandated by Article VI of the Constitution to take an oath to support it.

18. Note 23, *infra*. The Court has held that "the constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *New York v. United States*, 505 U.S. 144, 182 (1992).

Moreover, the CLEO is not even answerable in tort for some aspects of his execution of the Act.[19] Do these immunity provisions override the officer's potential liability under the federal civil rights statutes?[20] Or is she now accountable as a "federal" officer under the rationale of *Bivens*[21] and its progeny? And if so, does this immunity provision also provide immunity from a *Bivens* action, an immunity even a duly commissioned federal officer does not enjoy? And more oddly yet, does § 922(s)(7) create local tort suit immunity in some instances where a particular State has waived its sovereign immunity for comparable actions by its law enforcement officials? In other words, the Act not only affirmatively invades the States' sovereign immunity to suit, as argued below, but it may have created a defense to individual liability which a particular State has, in its sovereign judgment, decided to make unavailable to an erring law officer.

What happens when a CLEO is injured in the process of enforcing the Act? Is he a federal employee for purposes of the Federal Employees Compensation Act? If not, is she entitled to State workers compensation for an injury incurred outside the scope of her State-defined duties?[22]

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19. 18 U.S.C. § 922(s)(7).

20. 42 U.S.C. § 1983, et seq.

21. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (personal tort liability of individual federal officers for intentional constitutional torts).

22. See Note 34, *infra*.

The full extent of the offense against the Appointments and Faithful Execution Clauses can be capsulized by observing that the Brady Act would not even authorize an FBI agent or other duly appointed federal law officer to perform -- that is, to faithfully execute -- the requirements of the Act.

II. The Brady Act impermissibly waives the sovereign immunity of the States to suit by individuals illegally or incorrectly denied purchase of handguns.

Although the government lamely seeks to minimize the practical effect of the Brady Act's intrusion into State and local sovereignty,[23] the conceptual scope of the Act's intrusion is breathtaking. The Act can fairly be viewed as a legislative analogue to the British Crown's 18th Century writs of assistance commanding "all officers and subjects of the Crown to assist in their execution." That kind of governmental abuse of power was a direct cause of our Revolution and has been consistently condemned by this Court.[24]

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23. The government's reasoning that the criminal provisions of the Brady Act (18 U.S.C. § 924(a)(5)) do not apply to CLEOs is specious. (Office of Legal Counsel Memorandum of March 16, 1994; Printz Def. Ex. 2, Rec. 23.) There is nothing ambiguous in the least about the term "whoever violates...." Even a cursory reading of the statute reveals that just two classes of persons are charged with enforceable duties and prohibitions under the Act: gun dealers and CLEOs. And every gun dealer activity mandated or forbidden by Brady was punishable by the Gun Control Act as it existed prior to the Brady Amendments. See 18 U.S.C. § 924(a)(1)(D). Thus, by the government's analysis the criminal provisions of Brady apply to no one (or, at best, operate only to reduce some gun dealer felonies to misdemeanors).

24. See *Frank v. Maryland*, 359 U.S. 360, 363-365 (1959); *Henry v. United States*, 361 U.S. 98, 100-101 (1959); *Stanford v. Texas*, 379 U.S. 476, 481-484 (1965). See also, N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937); and Fraenkel, "Concerning Searches and Seizures," 34 Harv.L.Rev. 361 (1921).

Perhaps the most glaring example of this intrusion is § 925A of Title 18, added to the Gun Control Act by the Brady Amendments, which provides in pertinent part that

> ... any person denied a firearm ... due to the provision of erroneous information ... by any State ... or who was not prohibited from receipt of a firearm ... may bring an action against the State ... responsible for providing the erroneous information ... or ... for denying the transfer.

The section then provides for an award to the successful plaintiff of a reasonable attorney's fee "as part of costs."

We are not told in what court such an action will lie,[25] but it is clear that the proposed suits are targeted directly at States and their political subdivisions. The plain language of the provision also seems to suggest that an action would be available against a State by a citizen of another State[26] or of a foreign state[27] where the defendant

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25. Other than in this Court under its original jurisdiction. Const., Art. III, § 2.

26. This is more than a merely theoretical possibility given the two federal databases which the CLEOs are mandated to check by Attorney General Order No. 1853-94, 59 Fed. Reg. 9498 (Feb. 28, 1994). Every State participates in furnishing information to the National Crime Information Center and the information freely flows across State lines.

27. Legally admitted aliens are permitted by federal law to purchase firearms in the United States under certain circumstances. See 27 C.F.R. § 178.11, "State of residence."

State provides erroneous background information to an inquiring CLEO ("due to the provision of erroneous information by **any** state"). These would be obvious and impermissible violations of the Eleventh Amendment.

Nor is there any clue as to the source of funding for an award of attorney fees. It seems clear that no federal judgment fund would be available to satisfy a judgment against a State or one of its political subdivisions.[28] The only apparent answer is that the States and their subdivisions have involuntarily acquired a new liability for attorney fees and costs -- imposed by Congress and payable to private citizens. This would seem to add an entirely new dimension to the concept of revenue sharing.

Most offensive to the traditional concept of dual sovereignty, however, is the seemingly offhand manner in which the Act simply mandates that disappointed applicants may sue the State concerned. Period. And regardless of any State principles of sovereign immunity to suit.

We make no argument here that the United States (and its institutions and agencies) cannot sue a State. Those suits are clearly a function of the Supremacy Clause or of implied consent or waiver by the State in adopting the Constitution or in accepting Statehood.[29] But, we can find

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28. Unless incurring such an involuntary indebtedness could be deemed an implied contract-in-fact recompensable by suit against the United States. See 28 U.S.C. §§ 1346(a)(2) (District Court jurisdiction over implied contracts) and 1491(a)(1) (Court of Federal Claims jurisdiction over implied contracts).

29. *E.g.*, *United States v. Texas*, 143 U.S. 621 (1892); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Parden v. Terminal Railway*, 377 U.S. 184 (1964); *United States v. Mississippi*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965). The implied consent of the States to suit against them by the United States and its agencies is not, however, consent to suit by anyone whom the United States might wish to select as a plaintiff. *Blatchford v. Noatak*, 501 U.S. 775 (1991).

no case where Congress has ever purported to create, or this Court has ever sanctioned, a suit by a private citizen against a State on a private cause of action. "Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it...." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).[30]

We respectfully submit that it is not the scope of the federal intrusion which invalidates this legislation, but the fact of it. "The question is not what power the Federal Government ought to have, but what powers have been given by the people."[31]

III. The Brady Act contravenes the Takings Clause of the Fifth Amendment to the Constitution by impermissibly seizing State and local property without just compensation; otherwise, Congress has inadvertently created an enormous (and unfunded) liability for commandeered labor and resources.

The Fifth Amendment forbids the taking of private property for public use without just compensation. It is clear from the federal condemnation cases against States that State (and local government) property is "private property" for purposes of the Takings Clause.[32]

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30. *Nollan* held that "one of the principal uses of eminent domain is to assure that the government be able to require conveyance of [properties], so long as it pays for them," *ibid.*, which takes us to Argument III.

31. *United States v. Butler*, 297 U.S. 1, 63 (1936), quoted in *New York v. United States*, 505 U.S. 144 at 157 (1992).

In *New York v. United States*, 505 U.S. 144 (1992), the Court held unconstitutional a statute requiring that States "take title to" radioactive waste -- a commandeering of the States' resources. To require taking title to radioactive waste coupled with a legal obligation to move it, store it, or dispose of it, is to seize the States' time, money, effort, and other economic resources -- to seize private property. The Court phrased the issue there in property terms, "commandeering of resources," but did not address the Takings Clause ramifications.

The Brady Act mandates a similar seizure of State time, money, effort and other economic resources, and contains no compensation provision. If this is not a literal violation of the Takings Clause, it is the inter-sovereign analogue. And it is more perverse. Not only does the Act violate the sanctity of private property at the root of the Takings Clause, but it offends the basic concept of our federal constitutional system, dual sovereignty.

Outside the framework of reference of our federal system, when one sovereign entity simply by fiat or superior power appropriates the property of another, it is known as pillage, plunder, aggression or war. And it offends the deepest principles of international comity, just as this Act offends the principles of comity between the national government and the States:

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32. *E.g.*, *United States v. Carmack*, 329 U.S. 230 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *Chappell v. United States*, 160 U.S. 499 (1896). The federal power of eminent domain is limited by the Constitution so that property may only be taken in the furtherance of an enumerated power. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 688 (1896).

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[33]

We know the sheriff and his employees are not regarded as federal employees for compensation purposes.[34] Neither, then, can his supplies, equipment, and other resources be so regarded.

If federal agents marched into Sheriff Printz' office tomorrow and confiscated for their own official use a portion of his office supplies, part of his employee payroll, and a third of the gasoline in the tanks of his patrol cars, there could be no doubt that their actions were illegal. The fact that they did it pursuant to the Attorney General's instruction or a judge's warrant would not lessen the offense; indeed, it would raise the act from simple theft to an unconstitutional taking by the United States. One cannot

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33. *Texas v. White*, 7 Wallace 700, 725 (1869).

34. *Walton v. United States*, 213 Ct.Cl. 755 (1977) (even specially deputized state and local officers are not federal employees for compensation purposes since they are not appointed to federal civilian positions). On the other hand, there may be workers compensation benefits available to CLEOs under the Federal Employees Compensation Act, 5 U.S.C. § 8101, *et seq.*, which extends benefits to State and local officers injured while apprehending federal criminals and to "an individual rendering personal service to the United States." See *City of Whittier v. United States Department of Justice*, 598 F.2d 561 (9th Cir. 1979).

hypothesize a situation short of federal martial law where such conduct would be defensible.

What the Executive Branch and the Courts cannot do under color of official authority we submit the Congress likewise cannot do. And the reason is plain: such arbitrary takings without compensation offend the Fifth Amendment.

The Court of Appeals in its decision below[35] attempted to sidestep this aspect of the Act by characterizing it as *de minimus*.[36] This is akin to holding that the Act is not grand larceny but merely pickpocketing. The plain language of the Takings Clause would not appear to countenance "minor" takings without compensation. And when the cumulative national effect of the Act upon the property of the States is taken into account, it can hardly be argued that the taking is insignificant.[37]

If the Court were inclined to rule against the Takings Clause objection, then the government will eventually be confronted with the rather interesting question of whether Congress has unintentionally created a large, unfunded liability in implied contract.[38]

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35. 66 F.3d 1025.

36. "... nothing unusually jarring...." *id.* at. 1029; "... no more remarkable...." *ibid.*; "... a minimal interference with state functions...." *id.* at 1031; "... not different from other minor obligations...." *ibid.*

37. In less than one year in just 30 States, CLEOs were required to process more that 440,000 Brady Act applications. GAO Report, Note 2, *supra*, at 29-30 (Table 2.1).

38. See, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Missouri Health & Medical Organization, Inc. v. United States*, 226 Ct.Cl. 274, 641 F.2d 870 (1981). *Cf. General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

CONCLUSION

Those provisions of the Brady Act purporting to require federal law enforcement duties to be performed by State and local officials and purporting to create a cause of action by disappointed citizens against their State or local governments should be declared unconstitutional. The decision below should be reversed.

Respectfully submitted,

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